

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOISE PEPION COBELL, <u>et al.</u>,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action Number 96-1285 (RCL)
)	
GALE NORTON, Secretary of the)	
Interior, <u>et al.</u>,)	
)	
Defendants.)	
_____)	

MEMORANDUM and ORDER

On November 14, 2001, the Special Master issued the Report and Recommendation of the Special Master Regarding the Security of Trust Data at the Department of the Interior (“Special Master Report”). On November 26, 2001, the Department of the Interior filed its response to the Special Master report arguing, inter alia, that the “clearly erroneous” standard of review articulated in Rule 53(e)(2) is inapplicable to the findings of the Special Master’s Report, insofar as the investigation did not comport with the type of hearing and due process protections contemplated by the Federal Rules.¹

Interior specifically argued that the Special Master Report was not entitled to deference pursuant to Fed. R. Civ. P. 53(e)(2) because it was not accompanied by a “transcript of the proceedings and of the evidence and the original exhibits” (see Fed. R. Civ. P. 53(e)(1)) and because it failed to identify all of the “government employees and private contractors” interviewed. Response at 3

¹ At no time has Interior disputed any of the facts disclosed by the Special Master regarding the state of its computer security. To the contrary, Interior has consistently acknowledged “that problems exist with respect to trust data security,” Response to the Special Master Report at 1, and that “substantial effort continues to be necessary to ensure that the security of Indian trust-related IT systems is adequate,” Response to Plaintiffs’ Motion for Temporary Restraining Order as Amended at 4.

n.3. Interior amplified its concerns in its Response to Plaintiffs' Renewed Motion for Temporary Restraining Order As Amended where it contended that "[t]he Special Master's Report identifies a variety of sources of evidence upon which its conclusions are based, including interviews with 'government employees and private contractors' and review of thousands of mostly unidentified Interior communications." Id. 6. See also Interior Defendants' Surreply in Opposition to Plaintiffs' Renewed Motion for Temporary Restraining Order at 1 ("Interior Defendants point to three reasons why *de novo* review is appropriate: (1) the Special Master's factual findings 'were not based on hearings conducted after notice;' (2) the Special Master relied on *ex parte* contacts; and (3) the Special Master did not file a record with the Report" (citations omitted)).

On December 20, 2001, the Special Master filed the Supplemental Report of the Special Master Regarding the Security of Trust Data at the Department of the Interior setting out procedures and protocols he employed in obtaining the testimony and documentary information which formed the basis for the Report.

On December 31, 2001, Interior filed the Department of the Interior's Response to Supplemental Report of the Special Master Regarding the Security of Trust Data at the Department of the Interior in which it acknowledged that the Supplemental Report of the Special Master "identified the persons interviewed in drafting the Special Master's Report" and that the "Special Master also provided the parties with all documents which he consulted." Response to Supplemental Report at 1-2. While explicitly reserving "the right to argue that future reports are not entitled to deference if the procedural requirement of Fed. R. Civ. P. 53 and other applicable law are not observed," id. at 2, n.1 (and while specifically objecting to the appointment of a receiver over computer security measures),

Interior conceded that “[t]he Supplemental Report and the provision of the documents which the Special Master consulted address, for purposes of the Special Master’s Report, the Interior Defendants’ arguments noted above.” Id. at 2.

As Interior does not dispute the underlying facts set out in the Special Master Report, and, as it concedes that the Special Master’s Supplemental Report adequately addresses the due process concerns it enunciated in previous pleadings, this Court adopts the finding of the Special Master Report and it is hereby entered into the record of this case. See Fed. R. Civ. P. 53(e)(2) (“In an action to be tried without a jury the court shall accept the master’s finding of fact unless clearly erroneous.”) (emphasis added). Interior has not even argued that any of the Special Master’s findings are clearly erroneous. Interior did object to the Special Master’s failure to note that in September and October, 2001, Interior contracted with Predictive Systems, Inc., the contractor used by the Special Master to penetrate Interior’s computer systems, to assist Interior in improving IT security. The Court agrees that this was in fact a positive action by Interior, although it was too little, too late, to enable Interior to avoid emergency injunctive relief.

The Court does not today decide whether appointment of a receiver or other judicial officer, as recommended by the Special Master, in light of his findings, is appropriate. Further proceedings in that regard will be conducted.

SO ORDERED.

Date: _____

Royce C. Lamberth
United States District Judge